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Utah Supreme Court

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Harvey J. Sjostrom; Attorney for Petitioner;

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IN THE SUPREME COURT
of the State of Utah

MAHALA E. LAWLOR,

Plaintiff and Respondent,

- vs -

R. KEITH LAWLOR,

Defendant and Appellant.

PETITION

for

REHEARING

No. 7742

FILED

FEB 27 1962

Harvey A. Sjostrom,

Clerk, Supreme Court, Utah

Attorney for Petitioner.

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IN THE SUPREME COURT OF THE STATE OF UTAH

MAHALA E. LAWLOR,

Plaintiff and Respondent,

-VS-

W. KEITH LAWLOR,

Defendant and Appellant.

)
)
) PETITION

)
) for

)
) REHEARING

)
) No. 7742

TO THE HONORABLE SUPREME COURT OF THE STATE
OF UTAH:

Extension of time for filing Petition for
Rehearing having heretofore been granted,
comes now appellant and petitions herein
and files his petition for Rehearing, and
states that the opinion as rendered by the
Court is in error in the following particu-
lars:

POINTS OF ERROR.

1. This Court erred in failing to recognize
that the Court below found in its Finding of
Fact that the home of the parties had a
market value of \$5000.00 (pp.13) and that
there is absolutely no evidence to support

the Courts finding that said home would be worth \$5000.00 to plaintiff, though the true market value was between \$2500.00 and \$3000.00 which was also the contention of plaintiff and her counsel, counsel for plaintiff labeling the market valuation put on home by Court below and defendant as "reckless" in his brief. (pg.10)

2. The Court erred by failing to give notice or force to that rule of law which holds a party to their own pleading and evidence.

Harvey A. Sjoström

Attorney for Appellant.

I, Harvey A. Sjoström, attorney for appellant and petitioner, hereby certify that in my opinion there is good reason to believe that the decision rendered by the Court herein is erroneous in the particulars set forth in the foregoing petition and that said matter and decision should be re-examined.

Harvey A. Sjoström

(23)

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and that its market value was not as contended for by plaintiff and her counsel that it was worth in the market only between \$2500.00 and \$3000.00 and with which the opinion of the majority of this Court agrees. The majority of this Court evidently recognizing that rule of law that plaintiff was bound by her own valuation of said property and accepted the contention of plaintiff's counsel in his brief (pg.10) that defendant's value of \$5000.00 was "reckless and unfounded." Of course this is also finding by plaintiff's counsel and which thereby necessarily holds the lower courts finding was also "reckless and unfounded" and the majority of this Court seems to agree with this theory. Does counsel not here concede as the majority of this Court seems to that if the home has a market value of \$5000.00 as actually found by the lower Court that it would be an abuse of discretion for the Court to make such an award as it finally did in its judgment. If not, why does counsel assert that \$5000.00

is a "reckless and unfounded" market valuation.

In answer to Chief Justice Wolfe's theory that the home should have been valued at \$5000.00 which it actually was by the Court in its Finding and only upon payment of this sum by defendant should defendant have a right to take the home. It seems sufficient to say that defendant should not have to pay more than what plaintiff and her counsel contended that it was worth which of course was \$2500.00 by plaintiff and up to \$3000.00 by her witness Johnson. Nor is there any evidence from which lower Court can base its Finding and Judgment on that the home was worth more to plaintiff than her own valuation as made out by her pleadings and testimony. It has always been our understanding that on a matter of this kind a party is not only bound by his pleading but by his evidence. This Court has heretofore so held in discussing Judicial Admissions,

now the law in this state, let us have a unequivocal pronouncement to that effect for the professions future guidance and let this Court further say that it is not an abuse of discretion for a Court to award almost twice as much as a party contends for in both his pleading evidence at trial and in brief on appeal.

Supposing in this case that the property of the parties had consisted only of cash in the sum of \$5000.00 which happens to be the market value of the home as found by the Court and that plaintiff had valued her share between \$2500.00 and \$3000.00. Would this Court say it was an abuse of discretion for the lower Court to award her the whole \$5000.00 ? We believe it would. Merely because the lower Court awarded \$5000.00 in another form in the instant case which is \$2500.00 more than plaintiff contended the property was worth should that make any difference ? We would say not. In a 1983 plaintiff says the home

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is worth \$2500.00 by her pleading and evidence. Defendant says it is worth \$4500.00 to \$5000.00 not only as to market value, which lower Court also finds, but that it is worth to him personally \$5000.00. Shall it be awarded to plaintiff who says the market value not only is \$2500.00 but who absolutely does not testify for her purpose it is worth more than \$2500.00 or to defendant with provision that he pay her \$2500.00 or \$3000.00 who not only says its market value is \$5000. but it is worth that much to him. Shall between \$3000.00 and \$2500.00 be wasted merely because she "wants it". While there is no doubt in anyones mind that she has worked in supporting family which she expected to do when the parties were married because defendant had been so shot up in the war it is also conceded by her that defendant did "all he could" and which I believe this Court as well as the lower Court is convinced of. So they are

equal in effort. Then why cast away \$2500.00 by allowing her the award as made by lower Court, when it would deprive her of no value but would benefit defendant between the sum of \$2000.00 and \$2500.00 on her own theory and contention. Certainly that is too much to waste because she "wants it." So therefore respectfully urge that this Court permit defendant, if he so desires, to allow him the right to take the horse upon payment of not more than \$3000.00 to plaintiff and if she desires to keep the same to pay to the defendant a further sum of approximately \$1500.00.

Respectfully submitted,

Harvey A. Sjostron.